

LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U. S.

OCT - 1952

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 23

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,

vs.

THE WILLETT COMPANY, an Illinois Corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF AND ARGUMENT FOR RESPONDENT.

CHARLES DANA SKEWIND,
10 South LaSalle Street,
Chicago, Illinois,

RICHARD J. DALEY,
33 N. LaSalle Street,
Chicago, Illinois,

WILLIAM J. LYNCH,
33 N. LaSalle Street,
Chicago, Illinois,

GEORGE J. SCHALLER,
33 N. LaSalle Street,
Chicago, Illinois,

Attorneys for Respondent.

TABLE OF CONTENTS.

BRIEF AND ARGUMENT FOR RESPONDENT.

	PAGE
Argument	9
Conclusion	24
Evidence Reviewed	4
Jurisdictional Statement	1
Opinion of the Supreme Court of Illinois	1
Ordinance of the City of Chicago	2
Questions Presented	8
Statement of the Case	2
Stipulation of Fact	3

SUMMARY OF ARGUMENT.

- I. The Supreme Court of Illinois did not decide a federal question 9
- II. If the Supreme Court decided federal questions its decision is in accordance with the decisions of this Court and its findings that (a) the interstate and local business of the respondent was inseparable; (b) that the respondent could not give up its intracity business and continue its intrastate operation and that (c) the tax levied upon an instrumentality used in both operations was necessarily a burden upon interstate commerce are supported by the evidence 13
 - A. There is ample evidence in the record to support the decision of the Municipal Court of Chicago and the Supreme Court of Illinois that the intracity operations of the respondent were in fact inseparable from its intrastate operations and that the respondent could not discontinue one and remain in the other 15

	PAGE
B. A tax upon an instrumentality of interstate commerce constitutes an undue burden upon interstate commerce	21

TABLE OF CASES CITED.

Atchison, T. & S. F. Ry. Co. v. Railroad Commission of State of California, 1931, 51 S. Ct. 553, 283 U. S. 380, 75 L. Ed. 1128	13
Cooney v. The Mountain States Telephone and Telegraph Company, 294 U. S. 384; 79 L. Ed. 934	19, 23
East Ohio Gas Co. v. Tax Commission of Ohio, 283 U. S. 405, 75 L. Ed. 1171	15
Erie R. Co. v. Purdy, N. Y. 1902, 22 S. Ct. 605, 185 U. S. 148, 46 L. Ed. 847	13
Fox Film Corporation v. Muller, Minn. 1935, 56 S. Ct. 183, 296 U. S. 207, 80 L. Ed. 158	13
Geo. O. Richardson Machinery Co. v. Scott, Okla. 1928, 48 S. Ct. 264, 276 U. S. 128, 72 L. Ed. 497	13
Hanley v. Kansas City Southern R. Co., 187 U. S. 620	14
International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Bd., Wis. 1949, 69 S. Ct. 516, 336 U. S. 245	13
Interstate Busses Corporation v. Blodgett, 276 U. S. 245	14
Lehigh Valley R. Co. v. Penn., 145 U. S. 200, 26 L. Ed. 672	15
Leloup v. Port of Mobile, 127 U. S. 650	19
Lynch v. People of New York, ex rel. Pierson, 1934, 55 S. Ct. 16, 293 U. S. 52, 79 L. Ed. 191	13
McCoy v. Shaw, Okla. 1928, 48 S. Ct. 519, 277 U. S. 302, 72 L. Ed. 891	13
Meyer v. Wells, 223 U. S. 298, 56 L. Ed. 445	21

Musser v. State of Utah, 1948, 68 S. Ct. 397, 333 U. S. 95, 92 L. Ed. 562	13
Northern Pacific Ry. Co. v. Washington, 229 U. S. 370	19
Oklahoma Tax Commission v. Texas Co., Okla. 1949, 69 S. Ct. 561, 336 U. S. 342	13
Osborne v. Florida, 164 U. S. 650	9, 17
Pacific Express Co. v. Seibert, 142 U. S. 339	10
Pacific Telephone & Telegraph Co. v. Washington Tax Com., 297 U. S. 403, 80 L. Ed. 760	23
Pullman v. Adams, 189 U. S. 420	9
Radio Station WOW v. Johnson, Neb. 1945, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092	13
Rotterman v. The Western Union Telegraph Company, 127 U. S. 411	19
Senn v. Tile Layers Protective Union, Local No. 5, Wis. 1937, 57 S. Ct. 857, 301 U. S. 468, 81 L. Ed. 1220	13
Sprout-Davis v. South Bend, 277 U. S. 166, 72 L. Ed. 833	9, 17
Williams v. Kaiser, Mo. 1945, 65 S. Ct. 363, 323 U. S. 471, 89 L. Ed. 398	13

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 23

CITY OF CHICAGO, a Municipal Corporation,
Petitioner,
vs.

THE WILLETT COMPANY, an Illinois Corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF AND ARGUMENT FOR RESPONDENT.

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

OPINION OF THE SUPREME COURT OF ILLINOIS.

The opinion of the Supreme Court of Illinois is included in the printed transcript of the record (Tr. 21) and is officially reported in 406 Ill. 286. The clarification opinion of the Supreme Court of Illinois is likewise included in the printed transcript of the Record (Tr. 39) and it is officially reported in 409 Ill. 480.

JURISDICTIONAL STATEMENT.

The petitioner relies upon subdivision 3 of Section 1257 of Title 28 Judiciary and Judicial procedure to give jurisdiction to the Supreme Court of the United States to review the judgment of the Supreme Court of Illinois.

STATEMENT OF THE CASE.

This case arose in the Municipal Court of Chicago upon the filing by the City of Chicago of a quasi criminal complaint against the respondent, The Willett Company, to recover a penalty for an alleged violation of an ordinance commonly called the "Carter's Ordinance" of the City of Chicago. The Complaint alleged that the respondent was engaging in the occupation of transporting freight by motor vehicle "within the city" without having first obtained a license in violation of Chapter 163 Municipal Court of Chicago (Tr. 1). The cause was heard by the Court without a jury (Tr. 2).

The ordinance in question provided in substance "that every express wagon, cart, truck, etc. * * * which shall be operated, driven or employed for the purpose of transporting or conveying bundles, etc. * * * *within the city for hire or award shall be deemed a cart* * * * whether such vehicle is employed or hired from any public stand, public way, barn, garage, office, etc. in the City of Chicago by the day, week, month or year," and that any person operating a cart shall be deemed a carter. The ordinance imposed upon each cart operated or controlled by a carter, an annual license fee ranging from \$2.75 for a one horse drawn vehicle to \$16.50 per annum for automotive vehicles of a capacity of four tons or more and further provided for a penalty for the violation of the said ordinance (Tr. 5, 6).

It is admitted by the petitioner that the tax in question is not intended to be a personal property tax upon the property of the respondent, a tax for the use of the roads nor a regulatory tax but is an occupational or privilege tax levied upon instrumentalities used by the respondent in interstate, intrastate and intracity business.

On the trial it was stipulated that the Willett Company advertised and held itself out to serve the public, connecting carriers and forwarding companies generally (a) by leasing trucks with drivers to shippers by the hour, day, week, year or any period; (b) by making contracts with shippers to perform all trucking for a fixed period; (c) by giving occasional service or handling single shipments in local cartage for any shipper at rates per hundred pounds, per ton, per piece or other unit; (d) by distributing pooling cars and (e) by rendering collection and delivery service, station or sub-station service for rail, water and highway motor carriers and forwarding companies either under contract or on some other basis (Tr. 7).

It was further stipulated that the Willett Company, in the course of its day's business, would transport property for hire, as set out above, under the following conditions:

"1. From points within the City of Chicago to other points within the City of Chicago; (2) From points within the City of Chicago to other points in the State of Illinois outside the City of Chicago; (3) from points in the State of Illinois outside the City of Chicago to points within the City of Chicago; (4) from points in the City of Chicago to points in Indiana; (5) from points in Indiana to points in the City of Chicago; (6) from points in Illinois, outside of the City of Chicago, to points in Indiana; (7) from points in Indiana to points in Illinois, outside of the City of Chicago; (8) from points in City of Chicago to points in Wisconsin; (9) from points in Wisconsin to points in the City of Chicago; (10) from points in Illinois, outside of the City of Chicago, to points in Wisconsin; (11) from points in Wisconsin to points in Illinois, outside of the City of Chicago" (Tr. 8).

It was further stipulated that the Willett Company does not solicit any business from any public stand or street of the City of Chicago and that the said respondent has secured a city vehicle license for all vehicles operated by them in the City; has complied with all of city ordinances necessary to be complied with to lawfully conduct its cartage business within the city except the so-called "Carter's Ordinance"; holds authority from the Interstate Commerce Commission to operate as a common carrier engaged in Interstate Commerce; has filed with the Interstate Commerce Commission a schedule which was in force and effect at the time of the alleged violation and that the respondent had also complied with all provisions of the Federal Motor Carrier Act and the regulations of the Interstate Commerce Commission regarding the operation of his vehicles; has complied with all of the provisions of the Illinois Motor Truck Act and pursuant to the provisions of that act had been granted authority to operate as a specialised, contract and local motor carrier of property in the State of Illinois (Tr. 8).

It was further stipulated that the operations of the Willett Company are so diversified that one of its trucks may, at various times during any day, haul to or from interstate contract carriers, common carriers and car-loading companies, parcel and freight in both intracity, intrastate and interstate commerce and during every single day of the year, carries along with property which never leaves the State, property destined to and from points outside of the State of Illinois (Tr. 9).

An executive vice president of the respondent testified that the company is engaged in the general trucking business and that the operation includes hauling of interstate, intrastate and local freight in the City of Chicago and that it was impossible for the respondent to separate its

intracity and intrastate freight from its interstate freight or to separate the types of freight from their vehicles and that the respondent could not withdraw from its local city business and continue either its interstate or intrastate business and that the intrastate and local city business was not divisible (Tr. 11, 12).

This witness further testified that the respondent had contracts with certain concerns in Chicago to do all of their hauling; that some of the larger contracts were with the Pennsylvania Railroad Company, Acme's Fast Freight; The Air Cargo, which services the airlines, United States Steel Company, Youngstown Steel Company, H. J. Hines Company Standard Brands, the Glidden Company, the Nubian Paint Company, Durkee Famous Foods, and other companies with plants or offices located within the City of Chicago but doing an interstate business (Tr. 12).

In its contract with the Glidden Company which is typical of other contracts, they furnished the company with about a dozen trucks and drivers. The trucks were delivered to the Glidden Company where they were loaded with articles, some of which are transported to points in the city while others are delivered to points outside of the State. He testified because of the arrangement with the companies they had no control of loadings and had no means of knowing how much of the trucking service is local, interstate or intrastate and that no records were kept to determine the proportions between local, intrastate and interstate business (Tr. 11-14).

The witness also described the respondent's contract with the Pennsylvania Railroad Company whereby they would pick up freight from the railroad to be delivered to points within the City of Chicago and also under the contract with the Pennsylvania Railroad Company they would pick up freight in and about the City of Chicago

to be delivered to the Pennsylvania Railroad Company which was to be delivered by the rail carrier to places outside of the City of Chicago and outside of the State of Illinois. (Tr. 12, 13) This evidence stands unrebutted in the record. (Tr. 8-13)

The trial court without filing an opinion found the defendant, "not guilty" (Tr. 2) entered a final judgment on its findings and certified that the judgment involved the question of the validity of the City Ordinance. (Tr. 2, 3)

A direct appeal was taken to the Supreme Court of Illinois. In the Supreme Court of Illinois the respondent contended that the phrase "within the City" as used did not limit the application of the ordinance to transportation of freight where both the point of origin and point of destination were within the corporate limits of the City of Chicago but that the phrase included all transportation where any part of the journey was within the city and thus levied a tax upon any vehicle operating within the city limits even if the journey was only a segment of interstate commerce, and thus constituted an interference with and a burden on interstate commerce in violation of the Federal Constitution.

The respondent there argued that trucks, for example, loaded with merchandise at the Glidden plant to be delivered to points in Indiana or Wisconsin would be subject to the tax levied by the ordinance because respondent's vehicle as a part of its interstate journey, operated "within the City". Similarly it was pointed out that freight coming into the Pennsylvania Railroad Station from points outside of the State and taken by the respondent at the station and delivered to other carriers in the City of Chicago from thence to be transported to points outside of the State would be subject to the tax because its journey in respondent's vehicles was entirely within the city although the particular

journey within the city was but a segment of its entire journey in interstate commerce. (Tr. 18-20)

It was also argued by the respondent that the undisputed evidence in this case showed that the local and interstate operations of the respondent could not be separated and that the respondent could not give up his intracity business and continue in interstate commerce, and that because the tax was levied upon an instrumentality used in both types of its operation the tax was necessarily a burden upon interstate commerce and invalid.

The respondent in the Supreme Court of Illinois also raised other questions not involving or in any way connected with interstate commerce, namely, (1) that the Carter's Ordinance violated the Constitution of the State of Illinois; (2) that it was not uniform as to the class upon which it operated; (3) was beyond the power granted to the City by the City and Villages Act of the State of Illinois; (4) the respondent was not a "carter" within the meaning of the ordinance; (5) the Illinois Truck Act repealed the right of the city to tax, license or regulate the business of a carter and that (6) because respondent was already paying an *ad valorem* tax upon its trucks as well as a municipal and state tax on the same vehicles for use of the roads and many other types of taxes and as the Occupational Tax was but a subterfuge to tax the same property over and over again it was therefore both oppressive and unreasonable and constituted a double tax contrary to the State Constitution.

In the Supreme Court of Illinois the petitioner contended that the phrase "within the city" limited the operation of the ordinance to transportation where both the point of origin and the point of destination were within the city and that it was the intent of the ordinance to include nothing other than local transportation, and that the evidence of inseparability of intrastate and intracity

business was insufficient to establish inseparability and that there was a total failure on the part of the respondent to prove that the tax levied by the ordinance constituted an undue burden upon interstate commerce. (Tr. 15-18, 20)

The Supreme Court of Illinois in affirming the judgment of the Municipal Court of Chicago sustained the petitioner's contention and held specifically that the term "within the city" limited the operation of the ordinance to transportation within the corporate limits of the City of Chicago, and based upon this construction held the ordinance valid but not applicable to the particular business of the respondent. (Tr. 22-29)

QUESTIONS PRESENTED.

1. Did the decision of the Illinois Supreme Court in affirming the judgment of the Municipal Court of Chicago finding the respondents "not guilty" wherein they held "that it was not the intent of the legislative authority of the City of Chicago to include by the use of the phrase 'within the city' the operation of the respondent corporation, involve a federal question so as to subject the decision to review by this Court?

2. If it is held that the Supreme Court of Illinois based its decision upon the privilege or an immunity of the respondent as a carrier of interstate commerce are the findings of the Municipal Court of Chicago and the Supreme Court of Illinois contrary to the manifest weight of the evidence in holding (a) that the interstate and intra-city business of the respondent was inseparable, and that the respondent could not give up one and continue the other?

3. Whether or not an "undue burden" on Commerce is shown by the facts and circumstances in this case?

ARGUMENT.

I.

The Supreme Court of Illinois did not decide a Federal question.

The tax levied by this Ordinance is not an *ad valorem* tax or property tax neither is it a "road tax". It is not a regulatory ordinance but purely a revenue ordinance levied as an occupational tax against an already overburdened industry.

Had the Supreme Court of Illinois construed the phrase "within the city" as contended for by the respondent the effect of the ordinance would have been to levy a tax indiscriminately upon any vehicle operating at any time within the limits of the city even if its operation was but a segment of interstate commerce and the ordinance would certainly be repugnant to the Commerce Clause of the Constitution. (*Sprout-Davis v. South Bend*, 277 U. S. 166; *Osborne v. Florida*, 164 U. S. 650; *Pullman v. Adams*, 189 U. S. 420)

The Supreme Court of Illinois rejected the argument of the respondent "Cartage Company" and adopted the interpretation of the words "within the city" suggested by the petitioner. (R. 24) The question of whether or not it was the intent of the City of Chicago in passing the ordinance in question to include the intrastate and interstate business of the defendant corporation is clearly a non-federal question. The State Court stated "that the question is one of application of the ordinance to the practical aspects of the hauling done by the defendant."

(Tr. 25) In adopting this construction of the words "within the city" the Supreme Court of Illinois followed the case of *Pacific Express Co. v. Seibert*, 142 U. S. 339, and held that the phrase "within the city" as used in the ordinance meant purely intracity commerce.

The opinion of the Supreme Court specifically held that the ordinance "is not invalid by its terms" (Tr. 22) and found that it was not the intent of the council of the City of Chicago to impose an occupational tax upon the operation of this respondent or others similarly situated. The Court merely construed the ordinance and found that it was not the legislative intent to levy an occupational tax upon carters whose operations were not confined entirely to the corporate limits of Chicago and in passing upon this question said:—

"It is the law in this State that this court will give a construction to a statute which will uphold its validity. The presumption is always in favor of the validity of an ordinance passed in pursuance of statutory authority. *City of Chicago v. Hebard Express and Van Co.*, 301 Ill. 570. * * *

It seems clear that the ordinance in question is not invalid by its terms, but could be held to be so by reason of its application to certain operators of carts, under the definition of the ordinance, in and around the city of Chicago. In other words, the ordinance is not invalid per se. It is only upon its application that a question of its constitutionality can arise. In *Pacific Express Co. v. Seibert*, 142 U. S. 339, it was said, 'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly con-

strued, does not in any manner interfere with interstate commerce. Thus, we find that the ordinance in question here, when construed in the light of the above language, is invalid only when it is applied to interstate commerce in its fullest sense." (Tr: 24, 25)

The Supreme Court of Illinois held that the ordinance was not applicable to the business of the respondent and made its position clear by saying:—

"It appears, insofar as we can ascertain from this record, that the defendant herein operates its trucks under contract with large industries, and, in the main, with other interstate carriers bringing property into the city of Chicago. The defendant itself does not determine what articles it shall carry on its trucks, but carries articles of all kinds, in interstate, intrastate and intracity traffic. It has no basis for differentiating between the shipments which it carries on its trucks, but carries what is given it by the contractor, retailer or carrier with whom it is dealing, and on every load the three types of property are so intermingled as to be impossible of separation. *It is apparent from these statements that the type of business done by the defendant herein is not one generally considered to be within the meaning of a carter's ordinance.* The defendant does not keep records of the shipments because he does not handle the shipments as such. He does not go from house to house picking up shipments for delivery within the city of Chicago, but his entire business is concerned with hauling under contract for various firms, enterprises and other contract carriers in the city of Chicago." (Tr. 27) (Italics ours.)

The Supreme Court of Illinois did not adjudicate any federal question and its decision was predicated upon the non-federal ground that it was not the intent of the council of the City of Chicago to levy an occupation tax upon

carters engaged in intrastate and interstate commerce. It merely adopted the petitioner's view and construed the phrase "within the city" as used in the Carter's Ordinance so as to exclude all transportation where the point of origin and the point of destination were not both within the corporate limits of Chicago or where such transportation within the city was but a segment of interstate operation and held that the ordinance was inapplicable by its terms to the intrastate as well as the interstate operations of the respondent. It certainly is within the province of a state court to construe its state statute particularly where it so construed such statute as to render it not obnoxious to the Federal Constitution.

It is true that the Supreme Court of Illinois in arriving at its conclusion discussed federal cases involving interstate commerce but this discussion was in general terms. The Supreme Court of Illinois employed the decisions under the Federal Constitution merely as persuasive authority for their independent interpretation of the language of the ordinance.

The Court in its clarifying opinion specifically said:—

"Our decision is that the Chicago Carter's Ordinance is valid, but, in the light of the rule of the foregoing cases could not be applied to the Willett Company because of the uncontradicted evidence which removes the Willett Company from the application of the license tax." (Tr. 40)

This statement of the Supreme Court of Illinois is entirely consistent with their original decision that it was not the intent of the city council to include within the preview of the ordinance the business of a Carter doing both a local and interstate business. (Tr. 32)

A Writ of Certiorari must be dismissed, where the state court's decision rests on non-federal ground, notwithstanding unnecessary discussion of constitutional question. (*Geo. O. Richardson Machinery Co. v. Scott*, Okla. 1928, 48 S. Ct. 264, 276 U. S. 128, 72 L. Ed. 497; *McCoy v. Shaw*, Okla. 1928, 48 S. Ct. 519, 277 U. S. 302, 72 L. Ed. 891.)

The Federal Supreme Court will not review a state court decision resting on an adequate and independent non federal ground, though the decision also rests upon an erroneous view of federal law. (*Radio Station WOW v. Johnson*, Neb. 1945, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092.)

Where a decision of a state court might have been either upon a state ground or a federal ground and the state ground is sufficient to sustain the judgment, the United States Supreme Court will not undertake to review it. (*Williams v. Kaiser*, Mo. 1945, 65 S. Ct. 363, 323 U. S. 471, 89 L. Ed. 398; *Fox Film Corporation v. Muller*, Minn. 1935, 56 S. Ct. 183, 296 U. S. 207, 80 L. Ed. 158; *Lynch v. People of New York, ex rel. Pierson*, 1934, 55 S. Ct. 16, 293 U. S. 52, 79 L. Ed. 191; *Kinlger v. Missouri*, Mo. 1871, 13 Wall. 257, 20 L. Ed. 635.)

The construction placed on a state law or ordinance is conclusive on United States Supreme Court. (*International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Bd.*, Wis. 1949, 69 S. Ct. 516, 336 U. S. 245; *Oklahoma Tax Commission v. Texas Co.*, Okla. 1949, 69 S. Ct. 561, 336 U. S. 342.) What the statutes of a state means, the extent to which it may be limited are questions on which the highest court of a state has the final word. (*Musser v. State of Utah*, 1948, 68 S. Ct. 397, 333 U. S. 95, 92 L. Ed. 562; *Senn v. Tile Layers Protective*

Union, Local No. 5, Wis. 1937, 57 S. Ct. 857, 301 U. S. 468, 81 L. Ed. 1229. See also *Atchison T. & S. F. Ry. Co. v. Railroad Commission of State of California*, 1931, 51 S. Ct. 553, 283 U. S. 380, 75 L. Ed. 1128.)

A federal question does not arise where the claim is made that a state statute is inconsistent with the power of Congress to regulate commerce among the states, and the highest court of the state holds that the statute was intended to apply and applied only to domestic transportation. (*Erie R. Co. v. Purdy*, N. Y. 1902, 22 S. Ct. 605, 185 U. S. 148, 46 L. Ed. 847)

II.

If the Supreme Court decided Federal questions its decision is in accordance with the decisions of this Court and its findings that (a) the interstate and local business of the respondent was inseparable; (b) that the respondent could not give up its intracity business and continue its intrastate operation and that (c) the tax levied upon an instrumentality used in both operations was necessarily a burden upon interstate commerce are supported by the evidence.

A tax on an instrumentality used in interstate commerce is a burden on interstate commerce and such a tax cannot be sustained unless it appears affirmatively in some way that the tax is levied only as compensation for the use of the highway or to defray the expenses of regulating motor traffic. Unless it is shown that the nature of the imposition is such as is directly proportionate to the use of the roads or services rendered by the city or if it bears no reasonable relation to the privilege of using the highway, it cannot be given presumptive validity. (*Interstate Busses Corporation v. Blodgett*, 276 U. S. 245; *Sprout v. South Bend*, 277 U. S. 170.)

The cases indicate that an instrumentality of interstate commerce can be taxed by a state or municipality only when the subject of that commerce which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state or municipality. *Lehigh Valley R. Co. v. Penn.*, 145 U. S. 200, 26 L. Ed. 672; *Hamley v. Kansas City Southern R. Co.*, 187 U. S. 620.

In the case of *East Ohio Gas Co. v. Tax Commissioner of Ohio*, 283 U. S. 405; 75 L. Ed. 1171, the Court held that an occupational tax on one engaged both in interstate and intrastate commerce to be valid must be imposed solely on account of the interstate business without enhancement because of interstate business done and it must appear that one engaged exclusively in interstate commerce would not be subject to the imposition and that the taxpayer could discontinue intrastate business without withdrawing also from the interstate business.

A.

There is ample evidence in the record to support the decision of the Municipal Court of Chicago and the Supreme Court of Illinois that the intracity operations of the respondent were in fact inseparable from its intrastate operations and that the respondent could not discontinue one and remain in the other.

The petitioner argues that the evidence is insufficient to establish inseparability of the respondent's Interstate and Intracity operations. The Supreme Court of Illinois noted this argument and said:—

“As we have previously stated, the question here is one of application of the ordinance to the practical aspects of the hauling done by the defendant.

In addition to arguing that the statute itself provides only for taxation upon persons transporting property 'within the city' and that this deals only with intrastate business, the city of Chicago admits that where the intracity and interstate operations are inseparable, and the defendant cannot separate the two, nor continue to engage in business if separation is attempted, the argument as to the tax being a burden upon interstate commerce might apply." (Tr. 25)

In order to argue this issue it is necessary to outline the nature of the respondent's business as shown in the record. The respondent owned a number of trucks which they leased to various concerns in the City of Chicago. The respondent furnished a driver with each truck. The lessee placed various parcels, packages, etc. in the truck to be carried in intra and interstate commerce as well as in local commerce. The respondent exercised no control over the vehicles or the destination of the freight carried. (Tr. 12)

An example is the respondent's operation with the Pennsylvania Railroad Co. The Pennsylvania Railroad Co. used these leased trucks to pick up packages and freight in Chicago which were delivered to the Pennsylvania Railroad station in Chicago to be transported by rail to points outside the State. Similar freight received at the station from points outside the State is delivered in respondent's trucks to various places in Chicago and to other carriers to be delivered to points within and outside of the State. In all of these instances the carriage by the respondent though wholly within the City is but an integral part of interstate transportation.

Similarly under its contract with the Glidden Company and other companies the respondent provided trucks and drivers. The trucks are loaded with freight at the Glidden Company in Chicago. When so loaded the truck

contains freight and parcels to be delivered to various other companies within the limits of the city of Chicago together with freight and parcels to be delivered outside of the City of Chicago to points in the State of Illinois and to points outside of the State of Illinois. In both types of operation respondent exercised no control over the vehicles or the destination of the freight or its nature and deliveries. This was done solely and exclusively upon orders given the driver by the Glidden Company.

Predicated upon these situations Howard L. Willett, Jr., an executive vice president for the respondent company testified that the interstate, intrastate and local business of the respondent company was not divisible as the company must offer a general flexible freight service to its clients in order to remain in business and that the respondent could not withdraw from the interstate business and continue in the intrastate business as it must completely serve the transportation needs of its shipper. (Tr. 12) These un rebutted facts certainly made out a *prima facie* case of inseparability.

In the cases of *Osborne v. Florida*, 164 U.S. 650, 41 L. Ed. 586 and *Pullman Company v. Adams*, 189 U.S. 420, 47 L. Ed. 877 this Court held similar enactments valid only because it affirmatively appeared that the intrastate and interstate business of the defendant was, in fact, separable. In the case at bar the evidence clearly shows and both the Municipal Court of Chicago and the Supreme Court of Illinois held, in a finding of fact, that it was "impossible to separate the intracity, intrastate and interstate business of the respondent".

The case of *Sprout-Davis v. South Bend*, (277 U.S. 166, 72 L. Ed. 833) is a case involving an ordinance of the City of South Bend, Indiana prohibiting with certain exceptions the operation on its streets of any motor bus for hire

unless licensed by the City. The carrier claimed that the ordinance violated the Commerce Clause and the Equal Protection Clause of the Fourth Amendment. Sprout carried passengers both in intrastate and interstate commerce. The license fee imposed was not an incident to any scheme of municipal regulations but as in the case at bar was for revenue only. In this case the Court held:

"It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city. It remains to consider whether it can be sustained as an occupation tax. A State may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce.

(And it may delegate a part of that power to a municipality.

But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition *and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business.* *Leloup v. Port of Mobile*, 127 U.S. 640; *Crutcher v. Kentucky*, 141 U.S. 47, 58; *Adams Express Co. v. New York*, 232 U.S. 14, 30; *Bowman v. Continental Oil Co.*, 256 U.S. 642, 647. Compare *Williams v. Talladega*, 226 U.S. 404, 417; *Postal Telegraph Cable Co. v. Richmond*, 249 U.S. 252. The Supreme Court of Indiana, far from construing the ordinance as applicable solely to busses engaged in interstate commerce, assumed that it applied to busses engaged exclusively in interstate commerce and that Sprout was so engaged. The privilege of engaging in such com-

merce is one which a State cannot deny. *Buck v. Kuykendall*, 267 U.S. 307; *Bush & Sons Co. v. Maloy*, 267 U.S. 317. A State is equally inhibited from conditioning its exercise on the payment of an occupation tax."

The case of *Leloup v. Port of Mobile*, 127 U.S. 650, and the case of *Rotterman, v. The Western Union Telegram Company*, 127 U.S. 411, both hold that a tax upon an occupation engaged both in inter and intrastate commerce is obnoxious to the constitution unless it appears that the intrastate and interstate business can be separated and so taxed.

In the case of the *Northern Pacific Ry. Co. v. Washington*, (222 U.S. 370) the train in question although operating from one point to another in the State of Washington, was also hauling merchandise from points outside of the State, destined to points within the State and from points within the State to British Columbia as well as carrying merchandise which had originated outside of the State and was in transit through the State to a foreign destination. The Court held this to be interstate commerce and the train an interstate train, despite the fact that it also carried local freight between points in the State of Washington and in view of the unity and indivisibility of the service and the paramount character of the authority of Congress to regulate commerce, the Act of Congress was exclusively controlling.

The case of *Cooney, Governor of Montana v. The Mountain States Telephone and Telegraph Company*, 294 U.S. 384; 79 L. Ed. 934 is legally identical with the case at bar. In that, the State of Montana taxed each telephone instrument used by the defendant. The telephones were used in intrastate and interstate commerce. The company could not discontinue its intrastate business without destroying its interstate business. In passing upon this case the Court said at page 392:

“A State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of the business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup v. Mobile*, 127 U.S. 640. There are ‘sufficient modes’ in which the local business may be taxed without the imposition of a tax which covers the entire operations.” *id.* p. 647; See *Williams v. Talladega*, 226 U.S. 404, 419. Where the tax is exacted from doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. *Sprout v. South Bend*, 277 U.S. 163; *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465, 470. (Italics Ours)

“A privilege or occupation tax which a state imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid. *Leloup v. Mobile*, *supra*; *Pickard v. Pullman Southern Car Co.*, 117 U.S. 34, 46; *Crutcher v. Kentucky*, 141 U.S. 47, 59; *Adams Express Co. v. New York*, 232 U.S. 14, 29, 31; *United States Express Co. v. New York*, 232 U.S. 35, 36; *Bowman v. Continental Oil Co.*, 256 U.S. 647, 648. In the case of the express companies, the principle was applied to a privilege tax imposed alike with respect to wagons used in the movement of both interstate and intrastate shipments. The local shipments ‘were handled in the same vehicles and by the same men’ that were employed in connection with the interstate transportation and it was impracticable to effect a separation. *Adams Express Co. v. New York*,

supra; *United States Express Co. v. New York, supra*. In *Bowman v. Continental Oil Co. (supra)* the question arose under a statute of New Mexico, laying an annual license tax of fifty dollars for each station distributing gasoline." (Italics ours)

This is the same situation that exists in the case at bar. Under its contracts the respondent carries freight in interstate commerce as well as freight in intrastate and local commerce. The tax in question is directed against the vehicle carrying these packages. This vehicle in the case at bar is an integral instrumentality of interstate commerce. This ordinance is an attempt to tax the instrumentality. The respondent being unable to separate its interstate and intrastate business and being unable to give up either and continue in business the ordinance is invalid if construed to apply to the operations of the respondent. It has repeatedly been held that the question of separability is a question ultimately for the State Court. (*Meyer v. Wells*, 223 U.S. 298, 56 L. Ed. 445)

In every case found where the tax was levied against an instrumentality necessarily used in both local and interstate commerce and where it appeared that the local and interstate operations were inseparable and that the carrier could not give up one and continue in the other, the enactment was held invalid as repugnant to the Constitution.

B.

A tax upon an instrumentality of interstate commerce constitutes an undue burden upon interstate commerce.

The petition argues that there is no proof in the record that the proposed tax of the City of Chicago upon the vehicles of the respondent created an undue burden upon interstate commerce and that a showing of inseparability between the interstate and the intracity commerce of the

respondent's business was insufficient to prove that the tax was an undue burden upon the interstate phase of respondent's business.

The petitioner fails to recognize the clear line of demarcation between the cases (1) where the tax is upon the gross amount of intrastate business done and (2) cases where the tax is levied upon an instrumentality of interstate commerce. It seems quite obvious that where a tax is levied against the interstate business of a company doing both intrastate and interstate business the burden is upon the respondent to show that the tax imposes an undue burden upon the interstate business of the company. This is because a tax upon gross incomes or profits derived from intrastate business is not a direct tax upon interstate commerce and may not and usually does not affect the interstate operation and if it does the effect is incidental.

Where the tax is levied solely upon the income or profit from purely intracity operations the tax may or may not be a burden upon interstate commerce of a carrier doing both intrastate and interstate business. In such a situation it is incumbent upon the carrier to show (1) that the intracity and interstate business are in fact inseparable and that the carrier cannot discontinue operations in one without discontinuing the other and (2) that the tax imposed is an undue burden on interstate commerce. The reason for this rule lies in the fact that the tax levied on intracity business is at best only an indirect and incidental burden upon interstate commerce, if a burden at all. On the other hand where the tax is levied against an instrumentality used in both intracity and interstate commerce and there is a showing that the two types of operations cannot be separated and that the carrier cannot engage in one and discontinue the other, the

tax is direct and it necessarily follows that is a burden upon interstate commerce.

The fact that the tax may be small when considered in its relationship to the entire business of a company engaged in interstate commerce is immaterial. No Court can formulate an exact standard by which the question of undue burden can be measured. An undue burden therefore must be presumed from inseparability. To hold otherwise would require the Court to determine this factual question in each instance without requisite standard.

The petitioner in support of his argument relies almost exclusively on the decision of this Court in the case of *Pacific Telephone and Telegraph Co. v. Washington Tax Com.* (297 U.S. 403, 80 L. Ed. 760) where the Court sustained the validity of a local taxing statute as against the objection that it was obnoxious to the commerce clause of the Federal Constitution. This Court held the act valid because of the lack of proof of undue burden on commerce although it held that the local and interstate operations were "inextricably entwined." The petitioner, however, fails to point out that the tax sought to be levied in this case was a tax upon the gross income from intrastate commerce. It was not a tax levied upon an instrumentality necessarily used in both local and interstate commerce as in the case at bar.

The case of *Cooney v. Mountain State Telephone & Telegraph Co.*, 294 U.S. 384, 79 L. Ed. 934 (rather than the cases cited by petitioner) is in point for in the *Cooney* case this Court held that a privilege or an occupation tax which a state or municipality imposes with respect to both interstate and intrastate business through indiscriminate application to instrumentalities common to both sorts of commerce is invalid where the operation cannot

be separated. It was apparent that the tax on the telephone instruments created a burden on the interstate operations of the company without further proof.

It is obvious that the ordinance is invalid unless the construction of the State court is adopted. It is a tax upon trucks that carry both intrastate and interstate freight. It is a tax upon an instrumentality of interstate commerce. Even though the tax may be small in amount it necessarily is a burden upon interstate commerce.

CONCLUSION.

It is respectfully submitted that the Supreme Court of Illinois did not pass upon a federal question and that the basis upon which this review was permitted is, in fact, non-existence and for this reason the Writ of Certiorari should be dismissed, or, in the alternative, the judgment of the Supreme Court of Illinois should be affirmed, as the decision is not in conflict with federal law.

Respectfully submitted,

CHARLES DANA SNEWIND,
RICHARD J. DALEY,
WILLIAM J. LYNCH,
GEORGE J. SCHALLER,

Attorneys for the Respondent.